IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.3393 OF 2005

IN

SUIT NO.2135 OF 1983

Jagdish Prasad Purshottamdas
Kedia and others. ...Plaintiffs.

vs.

Dipchand Mohanlal Shah & others. ...Defendants.

Mr.D.R.Jhuriya, for Plaintiffs.

Mr.N.S.Rodrigues i/b. Desai & Diwanji, for Defendant no.8 in support.

CORAM: D.K.DESHMUKH,J.

DATED: 13th June,2007.

P.C.:-

1. This is a notice of motion taken out by the defendant no.8 for directing the plaintiffs to withdraw the suit or for dismissal of the suit in view of the agreement reached between the parties.

The defendant no.8 relies on the written agreement dt. 13.6.1985. Perused that agreement. Clause 9 of the agreement is relevant which reads as under:-

> "The parties of the first part further agree and declare that they shall unconditionally withdraw the suit filed by them in the High Court of Judicature at Bombay being suit no.2135 of 1983 (J.P.Kedia and others versus D.M.Shah and others) (hereinafter referred to as "the said High Court suit") with no order as to costs thereof. The parties of the first part also agree and declare that they shall have the interim orders made in the said suit unconditionally vacated."

According to the defendant no.8 in view of this agreement the plaintiffs cannot prosecute the suit.

2. The reply has been field by the plaintiffs. There is only one justification given for not withdrawing the suit in terms of the agreement. The justification is that there is an oral agreement between the parties that suit will be withdrawn after

the defendant no.8 makes certain payment to the plaintiffs. It is also claimed that certain payments have been made by the defendants. What is pertinent to be noted is that in the affidavit it is nowhere stated as to on what date the oral agreement was arrived at, who were the parties to the oral agreement and what were the terms of the said agreement. I specifically asked the learned Counsel for plaintiffs to point out to me from the affidavit as to what were the terms of the alleged oral agreement between the parties. The learned Counsel stated that in the affidavit neither the date of the oral agreement is disclosed nor the persons who were the parties to the oral agreement is specified nor any terms of the oral agreement are specified. Normally a written agreement can be varied only by another written agreement executed by the same parties or parties claiming under them. The written agreement in a given case may be varied by oral agreement also but in that event the oral agreement will have to be specifically pleaded and details of the oral agreement will have to be given. In the present case inspite of being repeatedly asked, the

plaintiffs are not in a position to give any particulars of the alleged oral agreement because of which, according to him, the written agreement has been modified or varied.

3. After having heard the learned Counsel appearing for both the sides, I find that the reasons that have been given by the plaintiffs for not withdrawing the suit inspite of the written agreement admittedly arrived at between the parties are merely excuses. In my opinion, it is clear from the written agreement arrived at between the parties that the plaintiffs cannot be permitted to prosecute the suit. The suit is therefore, dismissed, in view of the written agreement which is admittedly arrived at between the parties to the suit a copy of which is at “Exhibit A” to the affidavit filed in support of this notice of motion. The notice of motion is also disposed of. Refund of Court fees as per rules.